Supreme Court, U.S.
FILED

961869 MAY 23 1997

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STAFF SERGEANT DERRELL A. CHRISTY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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May 1997

76 pp

QUESTION PRESENTED

Whether the petitioner was denied the right to the effective assistance of counsel under the Sixth Amendment when his trial defense counsel, after informing the court members during opening statement the defense was going to present evidence of the petitioner's peaceful, law-abiding nature and good military character, and establish the suicidal tendencies of the deceased through expert testimony, nonetheless failed to present any evidence on the basis that there "was no defense in this case."

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The petitioner, Staff Sergeant Derrell A. Christy, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 10 March 1997.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at *United States v. Christy,* 46 M.J. 47 (1997), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals (A.F. Ct. Crim. App., 14 February 1996), is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 10 March 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (West Supp. 1996) and 10 U.S.C. § 867(a) (West Supp. 1996).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

STATEMENT OF THE CASE

The petitioner was convicted of the unpremeditated murder of his wife, Lori Christy, in violation of Article 118 of the Uniform Code of Military Justice. He was sentenced to confinement for thirty-five years, a dishonorable discharge, total forfeiture of all pay and allowances, and reduction to the grade of airman basic. In response to the petitioner's post-trial

assertion of ineffective assistance of counsel, the convening authority ordered an unusual post-trial *Dubay* hearing.[1] The record of trial and the post-trial hearing record tell the sad story of the Christy family and the deficient performance of petitioner's defense counsel.

Mothers Day, 9 May 1993, was supposed to include a shared family outing between the Christy and Miller families at a park on Whiteman Air Force Base. Indeed, it began that way. The planned events changed, however, when Lori Christy and Jeanette Miller returned to the Christy household, ostensibly to pick up baseball gloves for the Christy's daughters. Lori and Jeanette had another reason for wanting be alone; they had been lesbian lovers for several weeks. R. 188.

What Lori and Jeanette did not realize at the time was that their husbands, Derrell Christy and George Miller, did not remain at the park. Instead, they also drove back to the Christy residence. When the petitioner walked into the residence, he found Lori and Jeanette in a sapphic embrace on the couch. R. 189. Upon being interrupted, Lori "jumped up" and Jeanette disappeared into the bathroom. R. 189. Shortly thereafter, Lori entered the bathroom and told Jeanette "[d]on't worry; it's OK." R. 189.

Jeanette then walked out of the house followed by the petitioner. Jeanette asked the petitioner if it would be all right if the Millers took the Christy children to their home since

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[1]This procedure was unusual in that a post-trial *Dubay* hearing much more commonly would be ordered by an appellate court, rather than the convening authority. Indeed, the so-called *Dubay* hearing had its genesis in the appellate context. *United States v. Dubay,* 17 USCMA 147, 37 CMR 411 (1967). Citations to the record of trial are prefaced with an "R" (*e.g.,* R. 31), while citations to the post-trial *Dubay* hearing are prefaced with "RD" (*e.g.,* RD 195). Exhibits introduced at the post-trial hearing are prefaced with the letters "HE" (*e.g.,* HE 6).

Lori and the petitioner would probably want to discuss the homosexual episode and "it would be better that the girls not be there." R. 189. Jeanette had no similar concerns with her own husband; George Miller was not only aware of the lesbian affair, he had previously joined the two women in a *menage a trois.* R. 217.

Once the Christys were alone, the petitioner did not react the way Lori and Jeanette expected. Within thirty minutes, Lori called Jeanette to tell her "that everything was OK, that [petitioner] was acting as though he wasn't even aware of what was going on." R. 189. At around 1700 hours on that same day, Lori called to ask if Jeanette was going to go to church with her.[2] After leaving the church service, the two women sat in the Miller's driveway "and talked for awhile." R. 190. Jeanette next heard from Lori when she received a phone call around ten-thirty that evening:

> She called my house at about 10:30 or so and indicated to me at that time that Derrell still was giving her the impression that he wasn't aware of the relationship or hadn't given her any kind of indication that he was going to talk about it. I told her that she was crazy if she didn't think that he knew what was going on. She said everything was OK and he was behaving normally, and then I hung up the phone.

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[2]The subject of the church sermon could not have been on a more timely subject; the evil of homosexuality. HE. 5. Either as a result of this sermon, or due to previous spiritual concerns, Lori marked passages in her bible referencing God's condemnation of homosexuality. RD. 72. While Capt Champion, the assistant trial defense counsel, testified that he was unaware of the bible at the time of trial, it appears to be plainly visible on the dresser depicted in Pros. Ex. 3. Further, the petitioner's sister, Pauline Miller testified that she informed Capt Champion of this. RD. 74. Ironically, Lori and Jeanette met at the church's "Vacation Bible School" in August 1992. R. 187, 203.

R. 190

Apparently the petitioner's silence was not to last. Jeanette Miller testified:

> At about 12:30 at night, or around that time, [Lori] called crying and said that he knew—you know—that he had confronted her, that she had told him the truth, and that she was very anxious and upset and indicated that she was going to take the Flexeril[3] that she had. So I handed the phone to George who talked to her until I ran up to the house, which was—it's just about a block away, if that much—and when I got in the door, she hung up the phone with George and then I proceeded to talk to her.

R. 190.

After Jeanette arrived at the Christy's residence, she found that Lori had not exactly "told [petitioner] the truth." "She indicated to me that she had told him that it was the first time that anything had ever happened, it was a mistake, and had tried to basically pacify him with that kind of information." R. 190. According to Jeanette, she convinced Lori that she shouldn't take the Flexeril pills, reminding Lori of her own prior assessment that suicide was "selfish" and "unfair." R. 191. Lori was persuaded, expressing her emphatic agreement: "You're right, you're absolutely right." R. 192.

Jeanette did not want to leave the Christy residence until the petitioner returned. However, after Lori assured her that she was no danger to herself, Jeanette returned to her own home. The next day, Monday, 10 May 1993, Lori went over to the Miller residence. According to Jeanette:

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[3]Described in the record as a "mild muscle relaxant." R. 191

> She was upset and she was very sad, but she was calm and rational. She was projecting into the future and trying to make some decisions about what she would do with regard to going—continuing her education—going to school—where she would live—how she would live. I reminded her of the calls that she had made about, I would say a week prior to this, to the Division of Family Services and Legal Aid and those places where she had already called to find out information about how you go about getting a divorce and how you get help. And we went over again, you know, what she would do with regard to talking to Derrell, how she would approach him, and she was very calm.

R. 193. According to Jeanette, the two women visited for about an hour and a half, during which time Jeanette told Lori "that she needed to tell [petitioner] the truth about our relationship and not to leave him with the impression that it was something that happened just one time." R. 193.

> I told her that she should go up and bring the girls down so George could watch them so that they wouldn't be there at the house while she talked to Derrell. She went up and got them and brought them down and then we went back up to the house. I was under the impression that she was going to tell Derrell that I was coming with her, but that was not the case, and, when I arrived at the house, Derrell was walking out the door, and, as soon as he saw me in the car, he immediately went back in the house. He was visibly angry.

R. 194.

Jeanette then "followed Lori into the house. She went in and sat down in the living room. I sat down in the living room

and listened to their conversation." R. 194. The petitioner and his wife talked for "maybe a half an hour or forty-five minutes, or something like that." R. 195. They discussed "getting a thirty day separation" and "the impression was that they were going to get a divorce." R. 194.

The conversation ended a little before 1800 hours when Lori told the petitioner that she was still intending to go on a pre-planned trip with Jeanette. Upon hearing this, the petitioner "slammed down his hands on the chair and immediately got up and stormed out of the house and slammed the kitchen door, and Lori followed him out there." R. 195. The petitioner told the women that he was going to "get gas and would meet us up at the [Whiteman Elementary School] program" scheduled for 1900 hours. R. 195. After the petitioner left, Jeanette remained with Lori for about fifteen more minutes and reminded "her of the plans that she had and how everybody would be supportive of her . . ." R. 195.

Jeanette left the Christy home around 1815 hours. Prior to leaving, she told Lori that she would pick out some clothes for the Christy children to wear to the school program and "Lori could take a shower and get ready." R. 196. The agreement was that Jeanette would return and pick up Lori at 1845 hours and they would attend the program together. At the appointed time, Jeanette called the Christy home but no one answered. The Millers then drove over to the Christy home. Upon arriving, Jeanette noticed that the kitchen door was open, but the screen door was closed. When no one responded to her knocks on the door, Jeanette entered the residence. R. 197.

Jeanette walked through the Christy home while calling out for Lori. When she entered the master bedroom, she noticed that Lori had indeed taken a shower; water was dripping in the shower and a towel was sitting out. *See* Pros. Ex. 3, R. 197. Jeanette also noted that the bed was unmade

and an alarm clock was "flashing and going off at 6:45 PM." R. 198, 199. She also checked the other bedrooms for Lori, to no avail.

According to Jeanette, she then "went downstairs into the basement and when I walked down the stairs, I stopped at the bottom of the stairs." *See* Pros. Ex. 1, R. 197, 198. When she reached this area, Jeanette stopped and yelled Lori's name. "I didn't go any further into the basement, other than to look around the corner to the laundry area, and I couldn't see anything in the laundry area, and I didn't go any further, and then I went upstairs." R. 197. Jeanette testified that she was in the Christy home for "[n]o more than two minutes, probably." R. 197. Jeanette explained what she did next:

> I ran up the stairs and ran out and slammed the kitchen door and walked towards the car feeling a really bad feeling, but recognizing that I had to stay calm because all of the kids were looking at me kind of expectantly. I got in the car and said, "I guess that maybe Derrell came to pick her up and take her up there; I don't know. She's not there; I don't know where she is."

R. 199.

The Miller family, along with the Christy children, then drove to the school. Although there is some discrepancy between the testimony of Jeanette and George Miller as to what occurred when they first arrived, they both testified that George looked around outside for the petitioner's car. According to Jeanette:

> . . . [W]e went and sat down in the auditorium, and after about maybe ten minutes, George came back in, and, by this time, I would say ten to fifteen minutes, Derrell had come into the auditorium, and I had sent Raegan [Christy] over to get him and

> show him where we were seated. He was sitting down two to maybe three seats away from us. George came in and knelt beside me and talked to me and said, "I couldn't find their cars—he's here—but where is she?" By this time I was very panicky, and I said, "I don't know were she is; please go back to the house and look for her." And so he went back to the house.

R. 200.

As George Miller later testified, he then went back to the Christy home on his own:

> I entered the house. I pushed open the kitchen door, and I started yelling Lori's name. I remembered that my wife had said that she planned on taking a shower, so I headed back towards the master bath. . . . I stood at the front entrance of the master bathroom and I looked all the way in to the end of it. The shower curtain was open and I thought maybe she had fallen and hit herself and was hurt in the shower. When the shower curtain was open, I could see everything in there, so I knew she wasn't in there.
>
> * * *
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> . . . [A]s I walked into the room and looked into the bathroom, I also noticed the alarm going off, the alarm clock that my wife had mentioned earlier. As I turned to leave, continually calling her name, I turned around and noticed a—I believe it was black—step ladder in front of the closet that was facing the—well, the same wall as the door.
>
> * * *

Well, we live in identical units on base and it is the same closet that I use, plus I probably saw uniforms hanging there. I immediately got concerned because—the step ladder being in front of the closet—if I had a weapon in my home, that is where I would put it to keep it away from my children—it would be the top shelf of my closet. So I immediately got concerned that there may have been a weapon in the house and that it may have been taken from the closet.

* * *

I immediately went directly out of the bedroom and directly across the hall to, I believe, the oldest daughter's room. I pushed open the door yelling Lori's name, looking for her. I then went to the youngest daughter's room and looked in there and also the bathroom, the hall bathroom.

* * *

I then went to the basement door, opened the door, and, as I opened the door, I was startled by the dog running up the stairs. I started down the stairs and the dog turned and went down the stairs and then proceeded to head off—at the bottom of the stairs, headed right towards the little family room they had set up down there, and I went to the left into a laundry room.

* * *

Then I left the laundry room and was met by the dog at the base of the stairs again. The dog turned around and immediately ran in front of the sofa. I followed the dog around the sofa and upon clearing the back of the sofa, I saw Mrs. Christy crouched down into the sofa. I started calling her name and

> moved around to the front of her and noticed that her complexion was very gray, her eyes were half open and her mouth was slightly cracked open, slumped in the couch, not moving.
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> * * *
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> I believe that I reached down to touch her to see if she was sleeping or unconscious or anything and upon reaching my hand down, I noticed about a quarter size hole in her shirt with a little ring of blood around it and some flesh. . . . I did notice a large black shotgun.
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> * * *
>
> I then—I was very upset at this time. I then proceeded to leave the house. I backed up from Mrs. Christy and pretty much ran out of the house.

R. 225–226.

According to Miller, he was so disquieted by the discovery that he could not remember the phone number to security police. Therefore, he got into his car and "sped off to the law enforcement desk" to report his find. R. 226. Miller testified that he arrived at the LE desk at between 1905 and 1915 hours. R. 227.

Jeanette Miller testified that after George had been gone five to ten minutes, she "saw through the gym windows four or five police cars go by with their lights on." Jeanette "just assumed they were connected [with Lori] somehow." R. 200. She gained entry to the school office and called the Christy residence. The phone "was answered by a law enforcement troop who indicated that there was a problem at the house." R. 200. Jeanette returned and told the petitioner, "You have to go home; there is a problem at your house." R. 200.

Sgt Duane Holmes testified that he was the third security policeman to arrive at the scene after being notified that "there was a possible suicide attempt" at the Christy residence. R. 231. After beginning a search of the upstairs portion of the residence, Sgt Holmes and the other offficers received a radio call "saying the person was downstairs." R. 232. Sgt Holmes explained what happened next:

> At that time, we reversed order and Sergeant Hermann opened up the door and he went downstairs first. I was behind him and Sergeant Latta covered up the rear. We got down to the end of the steps and Sergeant Hermann went off to the left into like a laundry room that was curtained off; myself and Sergeant Latta went off to the right.
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> * * *
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> When we went off to the right, we—Sergeant Latta went off to the left-hand side and I went off to the right, and, when we approached the couch, that's when we found Mrs. Christy.
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> * * *
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> At that time, Sergeant Latta felt for a pulse and there was no pulse. The hospital clinic came downstairs; they verified that she was deceased. When they were coming around by the shotgun, that's when I picked it up, because they were getting too close to it, and moved it over to the north wall.
>
> * * *
>
> It [the shotgun] was laying on, more or less, the victim's lap. It was not in her lap, but it was in front of her left knee. The butt of the gun itself was laying on the floor next to her right foot and the barrel itself went across from her front knee—in front of it—and laid on the couch.

R. 232, 233.

After moving the shotgun, the officers tried to "clear" it. However, they found that "the charging handle itself wouldn't go down." R. 234. After hitting the slide release, they were able to eject the fired round. This indicated that the action had been opened and shut sometime after the round had been fired. R. 234–237. They also found an unfired shotgun shell between Lori's feet. R. 237.

The cause of death was determined to be the discharge of the shotgun into Lori's chest. R. 315. It was determined that at the time the shotgun was fired, the barrel was either in contact, or near-contact, with Lori's chest. R. 314. It was also determined that the angle of the wound was slightly downward 20–25 degrees. R. 315.

The initial focus of the OSI investigation was on a theory that Lori had committed suicide. R. 35–36. There was good reason for this. First, it wasn't until the next evening that the security police officers informed the lead OSI investigator, SA Messick, that they had found the shotgun in a cocked condition.[4] Second, it was known that Lori had threatened to commit suicide the night before. Third, what could be interpreted as a suicide note, in Lori's handwriting, was found on a "computer hutch" in the upstairs living room. R. 252, Pros Ex 7, 10. Fourth, as mentioned above, the wound was of the contact or near contact variety. Fifth, Lori's left hand had visible gunpowder residue. R. 250, 251, 285, Pros. Ex. 5.

Another possible theory was a "double" suicide pact between the two lovers, Jeanette Miller and Lori Christy. R.

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[4]Even when SA Messick was informed of the condition of the shotgun, he still considered "that maybe the security police had done something which they felt bad about and were now shading things" to conceal it because "that's happened in the past." R. 36.

37. This theory was circumstantially supported by the results of gun powder residue testing conducted on the petitioner, George Miller, and Jeanette Miller. R. 14, 250. SA Messick explained the results of that testing:

> Derrell came back as—basically, there was nothing on his hands, but it was consistent of somebody walking around normally every day. Jeanie's hands, as the examiner told me, *were too clean*. I guess you pick up organic compounds and those will come out during their testing, in whatever procedure they use for that. George Miller's they noted as unusual because there was a slight increase in the organic compound, whatever is consistent with gunpowder, I believe, on his right hand, but it did not meet a threshold high enough to come back and conclusively say he had, in fact, been in close proximity to the weapon. So there were basically two, Jeanie and George, that were questionable and arose suspicion in the back of my mind.

R. 38–39 (emphasis added). *See also* R. 285.

SA Messick testified that he did not consider the petitioner a suspect prior to 2 July 1993. R. 74. The OSI investigator had established that petitioner had an alibi before he even interviewed him. R. 16. This alibi consisted of statements obtained by the security police from Darren Barnard and Ray Ferraer.

> They accounted for Derrell's—essentially—his whereabouts—from—I guess—to clarify—Derrell left his residence. Jeanie Miller was still inside the residence. She departed about 6:15. Derrell had left prior to that. I believe he had stated about 15 minutes until 6 PM. He left the house while Jeanie was still there. He was never seen returning to the

> residence until the security police had already arrived on the scene. He left the school and had driven up into his driveway. To me there was nothing that showed that. Witnesses had identified George Miller's vehicle returning to the residence on a couple of occasions. Derrell's car was never seen.

R. 17.

The witness identifications of the Miller car included that made by SSgt Peter J. Felis, Jr. He wrote: ". . . I walked to approx 713 Earhart and my daughter was ahead of me on her bike, I told her we (my son and I) were turning around to go home, just as I turned I heard the screech of tires. I yelled to my daughter to get to the side of the road. I looked down the road and saw a dark, *compact type* car speed off. *See* item 16, "Index to Preliminary Documentary Evidence," *United States v. Christy,* Allied Papers (emphasis added).[5] This "screech of tires" was also heard by Alice L. Seemuth, who added that shortly before the sound of the car speeding off, she heard "a loud bang." *Id.,* item 17.

There were other factors which pointed to the presence of someone other than the petitoiner in the Christy household during the relevant time period. As Jeanette testified, the bed in the master bedroon was unmade when she returned at 1845 hrs. While this might, at first glance, indicate only that Lori laid down for a short nap, the autopsy revealed a different interpretation. It was discovered that Lori was wearing a vaginal diaphragm which had "several cc of a thick creamy material on its surface." I.O. Exhibit 13, Allied Papers. While it appears the "thick creamy material" was never analyzed, it

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[5]The peitioner's vehicle was a Pontiac Firebird Trans Am. *See, e.g.,* R. 240.

seems reasonable to assume that it was some type of spermicidal jelly or foam normally used in conjunction with diaphragms. Further, vaginal swabs were taken from Lori's body and a "moderate level of acid phosphatase activity (indicative of semen) was present on these swabs." I.O. Ex. 11, Allied Papers. While the laboratory report states that "DNA comparisons to any seminal contributor can be attempted on these swabs," *id.*, apparently no such tests were conducted. Given the tension in the Christy marriage as a result of Lori's bisexual infidelities, it seems unlikely that the petitioner was the recipient of her sexual affections. Further, given the sexual relationship between Lori and both of the Millers, George Miller would seem a likely source of the semen.[6]

The course of the investigation changed on 6 July 1993 when the petitioner made his first statement, placing him on the scene when his spouse was shot. On that date, following a polygraph examination conducted by SA Cain, the petitioner "asked the question, 'Was Lori's eyes partially open and was her mouth open when she was found.'" "At that point" SA Cain "was convinced . . . that [petitioner] was present in the house the day of her death." R. 105. SA Cain also testified that:

> Further into the interview, he admitted that he did return to the house that day, that when he returned, he found Lori Christy in the basement with the shotgun, leaning over the shotgun, in the process of committing suicide. He said he bolted for the gun

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[6]There is also the question about how, if George Miller fled the house in such a panicked fog, the Christy dog ended up in the master bedroom with the door shut. R. 232. It should be recalled, George Miller had testified that upon discovering the body, he fled the Christy residence, leaving the dog in the basement. R. 225–226.

> and yelled "No" in the process, and when he hit the gun or grabbed the gun, it fired.

R. 106.

On 8 July 1993, the petitioner was again interviewed by SA Cain and SA Messick. R. 107. "At that point, we asked him for the written statement and he said that he did not want to make one but he was willing to continue the interview. He wanted an opportunity to give the remaining details of what happened, and, so, he said on the 10th that he would provide this statement, which he did." R. 108.

The interview conducted on 10 July 1993 lasted for thirteen hours. R. 108. SA Cain testified that the petitioner made changes from the statement provided on 8 July 1993.

> The changes that he made was, on the 8th of July, he stated that when he left Harbor Motors that he went home and had the confrontation with Lori and then the shooting occurred, and then he proceeded to Darren Barnard's house. On the 10th, he said that he was mistaken, that he went to Darren Barnard's house before he went home because he said, during the conversation with Mr. Barnard, that he had mentioned something about clothes and what was he going to do, because they had been discussing divorce, and that reminded him that he probably should go home and get some clothes, and that's why he went back to the house.

R. 109. *See* Pros. Ex. 14.

> Another interview was conducted on 13 July 1993:
>
> Initially, in the other statement, he was unsure of who loaded the weapon; in his statement, he said that he did load the shotgun. He also stated that they argued and that she had made a comment about that she would have been better off if she had committed

> suicide. He said he called her bluff to that and that they proceeded to the basement. He loaded the weapon and handed the weapon to her. He said that she leaned over the weapon, but that at no time did she ever put her toe in the trigger guard. He said that he was sitting in the chair, and, at that point, he told her, "See, this is just another lie; you've lied about everything else and you're lying about this also." He said, at that point, he got up from the chair and walked over to the gun and he bent down and picked the gun up with his right hand. He said that Lori Christy held onto the barrel of the gun with her left hand and that the shotgun had pivoted against her chest as he was bringing it up. He said as he pulled the gun away, it fired because his thumb was on the trigger guard.
>
> * * *
>
> He said that he brought his hand up to the gun [after it was fired] and he thinks that the shell was ejected from the gun at that point. He said that in panic that he decided to reload the shell in the gun because he didn't think anyone would believe him, so he put the spent shell back into the shotgun and he said he did recall that she had written a suicide note because she had shown him the note when they were in the living room, so he said he put the spent shell back in the shotgun and he straightened the body up more in a sitting position and he placed the gun at her foot and departed.

R. 111–112. *See* Pros. Ex. 15. Additional facts necessary for the disposition of the question presented are set forth in argument below.

REASON FOR GRANTING THE WRIT

THE PETITIONER WAS DENIED THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT WHEN HIS TRIAL DEFENSE COUNSEL, AFTER INFORMING THE MEMBERS DURING OPENING STATEMENT THE DEFENSE WAS GOING TO PRESENT EVIDENCE OF THE PETITIONER'S PEACEFUL, LAW-ABIDING NATURE AND GOOD MILITARY CHARACTER, AND ESTABLISH THE SUICIDAL TENDENCIES OF THE DECEASED THROUGH EXPERT TESTIMONY, NONETHELESS FAILED TO PRESENT ANY EVIDENCE ON THE BASIS THAT THERE "WAS NO DEFENSE IN THIS CASE."[7]

1. Background and the DuBay Hearing.

On 14 July 1993, the petitioner was ordered into pretrial confinement by Capt Paul L. Dorsey, 353 MSS/CC. *See* DD Form 497, Allied Papers. After petitioner's incarceration, Capt Jasper Knight Champion, III, the local area defense counsel, was appointed as defense counsel.

Capt Champion was advised that a pretrial confinement hearing was scheduled for that Friday, 16 July 1993. RD. 98. He requested a delay until Monday, 19 July 1993 in order to read the "case file" (which included the petitioner's statements) and to enable circuit defense counsel, Capt Robert Scott Howard, to be present at the hearing. RD 97, 98.

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[7]RD. 233–234 (trial defense counsel testified at the *DuBay* hearing, *inter alia*, "we had no defense in this case.")

Upon discussing the case with the petitioner, Capt Howard and Capt Champion recognized a problem. Petitioner told them that, notwithstanding the statements he provided to the OSI, he was not home at the time Lori Christy was fatally shot. RD 216. This, obviously, posed a problem with regards to trial strategy. On the one hand, they could pursue an alibi defense and try to convince the members that the petitioner's statements were unreliable. On the other hand, they could accept that the statements represented an insurmountable obstacle, and pursue an "accident" defense. *See, e.g., United States v. Van Syoc,* 36 M.J. 461 (C.M.A. 1993); *United States v. Arnold,* 40 M.J. 744 (A.F.C.M.R. 1994).

At the *DuBay* hearing, both Champion and Howard testified that they believed the first approach was not likely to prevail, and advised the petitioner accordingly. RD 241. "With the other theory, which we ultimately went with, the theory of accident, there was a full spectrum of what he could be convicted of, you know, . . . murder, involuntary manslaughter, voluntary manslaughter, negligent homicide." RD 100.

The chosen approach was based on two prongs. The first involved presenting evidence of the petitioner's character:

> Q: During the course of preparing for trial, did you and Captain Champion have discussions with your client concerning character witnesses?
>
> A: Sure we did.
>
> Q: And what, if anything, did you tell him about your desire to use character witnesses?
>
> A: I indicated to Staff Sergeant Christy that we would like to have the names of several individuals that we knew that we might be able to use as character witnesses at a trial. Obviously, what I told him was that character witnesses can be used in this

> kind of case, because we are dealing with a violent crime, and that any kind of character witnesses we can use can be used to indicate that you are a non-aggressive individual, that you are a peaceful individual, that you are a law-abiding individual, and that these were the kind of character witnesses that I would be after, as an attorney, to possibly use in the case.

RD 227–228.

Although Capt Howard was lead counsel, he did not actively engage in the preparation of the character evidence. Instead, he left that aspect of trial preparation to Capt Champion. R. 228. Champion testified that the petitioner provided him with a list of nine names.[8] RD. 114, HE 7. Capt Champion testified that he contacted eight of those witnesses. RD. 114. The one he did not contact was Capt James Edwards, the only commissioned officer on the list. Capt Champion gave the following rationale for not contacting Edwards:

> Because I knew they were—all nine of those witnesses were basically the same thing, they were people with whom Derrell had worked; Captain Edwards was a potential character reference and Derrell told me that, and I decided since he was the only one that was not stationed on base, I decided that eight was enough to contact, because one more would not be that significant and the reason why I decided not on Captain Edwards was because he was off base.

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[8]Petitioner testified that he gave many more names to Capt Champion. *See, e.g.,* RD. 13–14, 44–45. However, resolution of this issue requires only the consideration of the information which defense counsel admitted they possessed.

RD. 115. From the eight witnesses contacted, Capt Champion testified that "I picked out what I thought were the four best ones and I had those four on telephone standby to come testify." RD. 115. This information was then passed on to Capt Howard. RD. 228.

The second prong of the planned defense involved the presentation of an expert witness, Dr (Col) Kamal K. Raisani. *See,* letter dated 22 November 1992, "SUBJ: Central Witness Funding, *U.S. v. Christy,*" Allied Papers. The purpose of Dr Raisani's anticipated testimony was to "demonstrate that Lori was suicidal. He did what's called a psychological autopsy and he looked . . . at a lot of things pertaining to Lori that would show her propensity to be suicidal, and he spoke to Jeanette Miller too." RD. 116, 123, 128, 231–234.

During opening statements, Capt Champion laid out the two pronged defense theory to the members. According to Capt Howard, both defense counsel "went over that opening statement in detail" before trial. RD. 260. The opening statement included the following representations:

> Now, the evidence is this case will show that Lori Christy was a very troubled young woman. She was troubled about both her marriage and her sexual orientation. You will hear evidence of her suicidal tendencies. The evidence will show that she did not want her entire family to find out that she was having a lesbian affair with Jeanette Miller. *You will hear evidence about the mental therapy that Lori was undergoing, as well as some of the things she wrote as part of her therapy.* The evidence will also show that on the day before Lori died, Sergeant Christy found her and Jeanette Miller on the couch embracing. And on the night before she died, she talked about committing suicide and she even had some pills laid out on the table and was ready to take them.

> In addition, you will see a note that was found after Lori's body was discovered. *And Colonel Raisani, an Air Force forensic psychiatrist, will testify that this note was, in fact, a suicide note. . . .*
>
> * * *
>
> *Finally, you will hear evidence and see evidence of Sergeant Christy's good military character* and that he has never been in trouble before. . . .

R. 184–185 (emphasis added).

None of the emphasized evidence was introduced. Indeed, the defense rested without calling a single witness. R. 340. The only defense evidence introduced during findings consisted of diagrams and photographs of the alleged crime scene. Def Exh. A-F. While Champion and Howard asserted that the decision not to present a defense case was made primarily out of a fear of rebuttal (*see* discussion *infra*), an examination of their *DuBay* testimony suggests that defense counsel knew, or should have known, *from the outset* that they would not be presenting evidence to support their accident theory as promised in opening statement:

> Q: Were you satisfied with the witnesses he [Capt Champion] had lined up?
>
> A: Sure. Yes, totally satisfied. I mean character witnesses, in a case like this, you want to use character witnesses *if you have any kind of defense case whatsoever.* I mean, if you've got a defense case, a viable defense theory that you can support with independent evidence, and in terms of this case, we had accident as a theory of the case; if we had independent evidence that this was an accident, then, certainly, character witnesses, three or four character witnesses, talking about Staff Sergeant Christy's peaceful character, his non-violent nature,

his law-abidingness, would, I believe, indeed have some impact on a jury. How much impact, I don't know, but they might, indeed, have some impact on a jury *if we had some kind of independent evidence to indicate that this was indeed an accident.*

RD. 229 (emphasis added).

Now, had we been able to present a solid accident defense, it would have been worth the risk to put Doctor Raisani on the witness stand and allow the prosecution to cross-examine Doctor Raisani on possibly all this damaging evidence. *But we were unable to present any kind of defense whatsoever concerning accident.* Doctor Raisani was quickly becoming just a shell of a witness around nothing at all for the defense to center or to anchor their case on. I mean, based on my professional judgment, and my experience as a defense counsel, this was quickly coming into a damage control case. *We had no defense on this case* . . .

* * *

. . . Again, from a defense perspective, if we had had something to anchor our case on, a good accident defense, character witnesses would certainly have been a viable option for the defense to use in this particular case. *Being as we had no defense in this case,* simply putting on a bunch of character witnesses to indicate that Staff Sergeant Christy was a law-abiding, peaceful, non-violent individual posed several problems. . . .

R. 233–234 (emphasis added).

Q: Now, the theory of your case was accident?

A: Yes.

Q: *But you had no defense of accident?*

A: *That's right.*

Q: And you had no evidence whatsoever, I believe you said, to support an accident theory?

A: Other than Staff Sergeant Christy's statements.

R. 254 (emphasis added).

The problem is, if there was no viable defense of accident because of a lack of "independent evidence" to support an accident theory, surely this is a circumstance which should have been apparent to Captains Howard and Champion *before the trial commenced.* But if this was the case, why did trial defense counsel promise to present evidence to advance an accident defense? Contrary to the assertion of trial defense counsel, it was the assistance of competent counsel, not a defense, which the petitioner was lacking.

2. Analysis

In *Strickland v. Washington,* 466 U.S. 668 (1984), the Court observed that "the right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Id.* at 685, *quoting Adams v. United States ex rel. McCann,* 317 U.S. 269, 275–276 (1942). A violation of the right to counsel, as defined by the Sixth Amendment, denies an accused the right to a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment. *Strickland,* 466 U.S. at 684, 685. *See also, United States v. Chronic,* 466 U.S. 648, 658 (1984)("the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial"). The right to counsel applies fully to service members facing trial by courts-martial. *See*

e.g., Article 38, Uniform Code of Military Justice, 10 U.S.C. § 838, *United States v. Gnibus,* 21 MJ 1 (CMA 1985), *United States v. Johnson,* 21 MJ 211 (CMA 1986), *United States v. Mansfield,* 24 MJ 611 (AFCMR 1987) .

Strickland established a two pronged test to be applied when a court is confronted with allegations of ineffective assistance of counsel.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687. With limited exceptions, such as the complete denial of counsel, an accused can establish a claim of ineffective assistance "only by pointing to specific errors made by trial counsel." *Cronic* 466 U.S. at 666. An analysis of errors cannot focus solely on outcome determination "without attention to whether the result of the proceeding was fundamentally unfair or unreliable." *Lockhart v. Fretwell,* 113 S.Ct. 838, 842 (1993). The actions, as well as inactions, of trial defense counsel in the case *sub judice* did result in a "fundamentally unfair or unreliable" proceeding for the petitioner.

With regards to the use of character evidence, it has long been recognized that "evidence of good character is often the best, if not the only defense the accused can produce." *United States v. Conrad,* 15 USCMA 439, 35 CMR 411, 420 (1965), *quoting United States v. Phillips,* 3 USCMA 137, 11 CMR 137, 142 (1953). While character evidence is not unique to the military, it does have an added dimension in trial by courts-

martial. Evidence of an accused's good military character may be introduced to demonstrate the unlikelyhood that he or she would have committed the charged offense. *See, e.g., United States v. Brown,* 41 MJ 1, 4 (CMA 1994)("Appellant sought to admit evidence of his religious beliefs as part and parcel of his 'good soldier' defense. . . . The evidence was not mere credibility evidence; it would have been admissible whether appellant testified."); *United States v. Smith,* 34 MJ 341, 342 (CMA 1992)("Upon request, an accused is entitled to an instruction calling attention to evidence of good military character."); *United States v. Benedict,* 27 MJ 253, 262 (CMA 1988)(Error to exclude accused's "awards, decorations, and officer effectiveness reports as evidence of the specific character trait of 'good conduct as an officer.'"); *United States v. Court,* 24 MJ 11 (CMA 1987); *United States v. Belz,* 20 MJ 33 (CMA 1985); *United States v. Vanderlinder,* 20 MJ 41, 45 (CMA 1985)("We believe, therefore, that the factfinder could reasonably infer that a person of 'good military character' would be unlikely to participate in an activity that is so harmful to military effectiveness."); *United States v. Piatt,* 17 MJ 442, 446 (CMA 1984)("In this context, a person's military character is properly considered a particular trait of his general character and a fact which may be relevant at a court-martial depending upon the issue for which it is offered."); *United States v. McNeil,* 17 MJ 451 (CMA 1984); *United States v. Clemons,* 16 MJ 44 (CMA 1983).

The authority for such evidence is Mil.R.Evid. 404(a)(1); *See Vanderlinder,* 24 MJ at 44 ("The Drafters Analysis makes clear that—whatever the term 'trait' means in Mil.R.Evid. 404(a)(1—'good military character' is a 'trait.'"). Of course, "good military character" was not the only trait available to the defense in this case. The witnesses could have established "Staff Sergeant Christy's peaceful character, his non-violent nature, his law-abidingness. . . ." RD. 229. Indeed, Capt

Champion testified that the witnesses he contacted were "very adamant about peacefulness and things like that. . . ." RD. 116, 141. These traits would likewise have been relevant and admissible. *See, e.g., Brown,* 41 MJ at 4 ("In a drug case, an accused is entitled to present evidence of being a good soldier *or a law-abiding person.*")(Emphasis added); *United States v. Stombaugh,* 40 MJ 208, 214 (CMA 1994)("Eleven witnesses testified for the defense concerning petitioner's character for *peacefulness* and truthfulness.")(Emphasis added); *United States v. Newman,* 34 MJ 1100, 1102 (ACMR 1992) ("'Character trait' refers to elements of one's disposition, 'such as honesty, temperance or *peacefulness.*")(Emphasis added) *quoting United States v. West,* 670 F.2d 675, 682 (7th Cir. 1982); *United States v. Williams-Oatman,* 38 MJ 602, 604 (ACMR 1993)("The military judge repeatedly informed the appellant that, if evidence of her *reputation for peacefulness* was presented, there could be cross-examination as to the knife.")(Emphasis added).

At the *DuBay* hearing, Captains Champion and Howard asserted two bases for not introducing this critical character evidence, both of which were utterly without merit. First, they asserted a fear that the members would perceive this as "blowing smoke." *See, e.g.,* RD. 119, 131. However, as they testified, they had "no defense." Thus, they incredibly decided to reject a valid character defense and proceed with a "no defense" defense! The predictable result was that the petitioner was convicted of unpremeditated murder as charged.

The second basis was an asserted fear of rebuttal evidence in the form of "did you know" type questions. This purported rebuttal consisted of (1) the alleged hearsay statements of Lori Christy that the petitioner had tried to force anal sex upon her and "was rough with her during sex," RD 234, and; (2) that the petitioner allegedly had a girlfriend

shortly after his wife's death. Addressing the alleged attempted sodomy and "rough sex" incidents first, Champion and Howard made it clear that the only source for this information was Lori's lesbian lover, Jeanette Miller:

> Q: And what the government had [for rebuttal] was that one statement by Jeanette Miller; is that correct?
>
> A: Yeah.
>
> Q: That's all the government had?
>
> A: Well, and, also, Lori's—some of the things Lori said about Derrell being rough with her during sex—
>
> Q: That was from Jeanette Miller; that information came from Jeanette Miller—
>
> A: And about Lori being afraid—yeah—it's from one source, but it's a lot of information.

RD. 141–142.

Even if this information was admissible, defense counsel could have easily diffused the impact by preparing their witnesses for the question in advance. Further, the provider of this purported information, Jeanette Miller, was far from an unimpeachable source. She, along with her husband, had been engaged in a sexual relationship with Lori and was encouraging her to leave the petitioner and move into the Miller home. R. 193. Quite obviously, Jeanette Miller would be biased against the man accused of killing her lover.

In addition, the defense could have diffused this testimony simply by introducing the evidence that they promised the members was going to be introduced: ". . . evidence about the mental therapy that Lori was undergoing, *as well as some of the things she wrote as part of her therapy*." R. 184 (emphasis added). These writings were

introduced during the *DuBay* hearing as Hearing Exhibits 6 and 8. Besides detailing how wonderful Lori felt the petitioner was as a husband, these writings also describe her need to be dominated during sex:

> I've always held a great desire to control every aspect of my life except one. Ironically the book I read claims many sexual abuse victims need to control the bedroom. I am opposite. *I like to be controlled during sex and feel very uncomfortable when Derrell gives me some control. I really like for him to totally control the love-making.*

HE 6, p. 25–26.

> I found it rather amazing that sexual abuse victims tend to have a need to control the sexual experiences. *I have no desire to control Derrell, and prefer to be controlled in that area.* After 8 years, I am still a little embarrassed to talk about fantasies, and desire, but like to hear Derrell talk about them. *Being controlled excites me.* We seem to be pretty compatible in that area.

HE 8, p. 36. In other words, the members would probably have chalked up the "rough sex" allegation as being nothing more than an aspect of *Lori's* character traits, the need to be totally controlled sexually, which found expression within the privacy of the marital bed.

With regards to the issue of whether the petitioner may have had a girlfriend after his wife's death, defense counsel never elucidated what theory they feared the information would be admissible under. RD 269–270. Are people who begin seeing members of the opposite sex following the death of their spouse less peaceable? Less law-abiding? What is the required period of mourning service members must observe before evidence of resumed dating is foreclosed from being

introduced to rebut their "good military character"? There was, of course, *no* evidence of any extramarital dalliances on the part of the petitioner.

Beyond all this, as trial defense counsel admitted, not all of the character witnesses which the petitioner referred to his counsel were even contacted for interview by his attorneys. Notably the single commissioned officer on the list provided by petitioner, Captain Edwards, was never interviewed. The only explanation given by his counsel for this lack of investigative effort was that this witness lived off-base and there were other character witnesses available in any event. Surely Captain Edwards' status as a commissioned officer was enough to render his testimony non-cumulative and the mere inconvenience of having to contact and request the production of a military witness living off-base was not sufficient to justify trial defense counsels' lack of investigative effort, even when applying "a heavy measure of deference to counsel's judgments" as we must when assessing investigative choices. *Strickland v. Washington,* 466 U.S. at 691. This lack of investigative effort made it impossible for trial defense counsel to properly advise their client to forgo the presentation of character evidence, a circumstance which, standing alone, can amount to ineffective assistance of counsel. *See U.S. ex Rel. Emerson v. Gramley,* 883 F.Supp 225, 244 (N.D. Ill. 1995) *citing Blanco v. Singletary,* 943 F.2d 1477 (11th Cir.1991). Even though the military judge presiding over the *DuBay* hearing deemed the decision not to call character witnesses "sound," he admitted that "Captain Champion should have contacted Captain Edwards to determine what exactly he had to say . . ." Findings of Fact & Conclusions—DuBay Hearing, p. 11.

Finally, the critical role that character evidence can play in a defense should never be overlooked. This Honorable Court has itself recognized that "[c]haracter evidence may

itself generate reasonable doubt in the factfinder's mind." *Vandelinder,* 20 M.J. at 47 *citing Michaelson v. United States,* 335 U.S. 469 (1948); *Edgington v. United States,* 164 U.S. 361 (1896). The petitioner submits that such evidence, coupled with the defense of accident, would have, at the very least, created sufficient doubt as to lead to an acquittal on the greater offense. As trial defense counsel pointed out, one advantage of an accident defense was that it would permit the factfinder to render findings on lesser included offenses, involving a lower degree of mental culpability (i.e. involuntary manslaughter, voluntary manslaughter, and negligent homicide).

Turning to the issue of Dr Raisani's testimony concerning Lori's suicidal tendencies, the asserted defense position was again two-fold. First, they believed the information was adequately developed through the prosecution's witnesses. Second, they feared such testimony would open the door to rebuttal evidence. They were wrong on both counts.

It can hardly be gainsaid that establishing the suicidal state of mind of Lori Christy was the linchpin to any defense in this case.[9] The petitioner's statements to the OSI asserted that Lori had placed the shotgun against her chest and was preparing to shoot herself. Lori's death occurred, according to the statements, when the shotgun inadvertently discharged while the petitioner was trying to take the shotgun away from her as she maintained a grip on the barrel. If the suicidal

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[9]As the Air Force Court correctly points out, "under the accident theory of the case, it was essentially conceded that Lori had not, in fact, committed suicide." *Christy,* at 9 (Appendix). However, evidence of Lori's suicidal state of mind was still critical evidence corroborating the petitioner's account that Lori was accidentally killed during a suicidal gesture gone awry.

tendencies could be established, the physical evidence at the scene would support the petitioner's explanation. The wound was a contact or near contact type of wound and Lori had considerable gunpowder residue on her left hand.

Contrary to the assertions of trial defense counsel at the *DuBay* hearing, the prosecution did *not* establish that Lori was suicidal. In fact, Jeanette Miller testified that Lori *was not* genuinely suicidal, had never mentioned suicide in anything more than a "jesting way," and had never threatened to take her own life. R. 207, 213. Indeed, according to Jeanette, Lori "firmly" felt that "suicide was the most selfish thing that anyone could ever do." R. 191.

Jeanette testified that after Lori made the threats to take the Flexeril pills, Jeanette reminded her of her opposition to suicide, to which Lori replied "You're right, you're absolutely right." R. 192. Jeanette also stressed that when she left she "was completely confident in leaving—that Lori wasn't appearing to be suicidal and seemed to be herself. I wasn't—I had no fear. I would not have left if I had." R. 213. Jeanette further testified that when she left Lori at around 1815 hours on 10 May 1993, she was "calm" and making plans for the future. "She was talking about going on our trip to Virginia. She was talking about what she was going to do with regards to the girls and where they were going to go and what they were going to do." R. 198.

This testimony hardly portrays the disposition of a woman contemplating committing suicide within the hour. The prosecution argued that Lori was not suicidal; rather it was a "scenario," created by the petitioner. R. 355. Trial counsel argued that it "was very likely [that the petitioner] goaded her with the gun. It is very likely that he did as he said—loaded the shotgun and was trying to get her—talk her into, or goad her into, committing suicide. But, even from his

own statement, it would look like she was having none of that." R.357.

The members never saw or heard about Lori's writings expressing her emotional distress and anguish, originating in her childhood and continuing into the time shortly before her death. HE 6 and 8. The members never heard from Karen Protratz, Lori's counselor, about the "therapy that Lori was undergoing." R. 184. Indeed, it appears from the *DuBay* hearing that Protratz was *never even contacted* by the defense. RD. 123. What Lori said and wrote in therapy was a virtual gold mine as far as the petitioner's accident—suicide defense was concerned. As defense counsel said in opening statement, the deceased was a very troubled young woman. Her therapy notes reveal a tragic and self-destructive life. She had been sexually abused at home by her brother—and this fact naturally tormented her for years. She was burdened with low self-esteem and a strong sense of guilt. She also described being abused by a neighbor. She discussed her destructive use of alcohol and drugs. She confessed to confusion about her sexual orientation as well as an unusual sexual appetite. She had a very troubled relationship with her mother and other family members. She had contemplated suicide even before her last attempt or gesture. The deceased was constantly angry and impatient with her two daughters and felt tremendous guilt as a result. It seems the lone bright spot in the deceased's life was her love for and devotion to the petitioner. She wrote she probably would have ended her life if it wasn't for petitioner's love for her. Dr Raisani's testimony and this "therapy evidence" was critical to demonstrate that Lori's destructive tendencies, as revealed by the "psychological autopsy," were long-standing and not subject to being turned off like a light switch. Yet, the defense turned their backs on this critical evidence and on the petitioner. After abandoning the petitioner, trial defense counsel might as well have scooted their chairs over to the prosecution table.

With regards to the concerns about rebuttal evidence, Capt Champion explained:

> Q: Would there have been potentially some harm to your client had Raisani testified, in your mind?
>
> A: There was potential harm, I mean, there was a risk. We didn't want to open the door to a lot of Lori's—a lot of things about Lori; primarily, some of the things that Lori claims—Derrell had threatened her to do certain things, and we didn't know—I'm not sure if it would have come in in rebuttal, but we couldn't predict what the judge's ruling would be, so we decided that since we had nothing to gain by putting him on, why take the risk of bringing in potential rebuttal evidence. And there was also—we were aware that you all had spoken to a Doctor Grant and that, I believe, he was an telephone standby,[10] and he could provide some rebuttal evidence, depending on what Doctor Raisani said, and, so, we thought, why bother, why risk it.
>
> Q: Had Doctor Raisani been provided a copy of the complete sanity board?
>
> A: Yes. I believe so, yes.
>
> Q: Did you consider the impact of having Doctor Raisani testify knowing that he might have based

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[10]Incredibly, it appears from this testimony that the defense *never interviewed* this potentially important prosecution expert. Even if the prosecution had called Dr Grant in an attempt to rebut Dr Raisani's "psychological autopsy," it would have posed little concern for the defense. A "battle of the experts" is nothing unusual in trials and the defense certainly had good evidence to cross-examine Dr Grant upon, including the suicide note, the incident with the Flexeril pills, and the contents of Lori's writings.

> part of his opinion on the contents of that sanity board?
>
> A: I'm sorry; ask me one more time.
>
> Q: Was there information contained in that sanity board report that Doctor Raisani reviewed which you felt might, in some way, have harmed your client?
>
> A: Yes, at the time, Doctor Raisani was aware of what Derrell had told the psychologist, and, that is, that he wasn't there; so, Doctor Raisani had access to all this, and, so we felt like that was fair game for you, the prosecution.

RD. 117–118.

Breaking these concerns down into component parts, it must first be recognized that Lori wasn't "claiming" anything; she was dead. What Capt Champion meant was that someone else was "claiming" that Lori made some statements. Again, it appears that the source of this information was none other than Jeanette Miller, the deceased's lesbian lover. For the same reasons set forth above, this should have been of *de minimus* concern to the defense.

With regards to Dr Raisani having seen the petitioner's sanity board report wherein the petitioner continued to deny he was at the scene, defense counsel's concerns are perplexing. As Capt Howard testified:

> At this point in time, it was obvious to me that the prosecution was only going to cross-examine Doctor Raisani *on one thing* and that was the fact that, during his interviews, Sergeant Christy's interviews with the psychiatrist, he had completely denied being at the house, completely denied any kind of participation in the death, and that the psychological reports that were on Sergeant Christy

> indicated that he was malingering and creating these ideas of any kind of amnesia, in other words, not owning up to the responsibility of what had occurred.

RD. 233 (emphasis added). If the issue was the *petitioner's* state of mind, then the information Dr Raisani gained from the report regarding any denial might have been relevant and admissible. *See, e.g, United States v. Mansfield,* 33 MJ 972 (AFCMR 1991), *aff'd* 38 MJ 415 (1993); Mil.R.Evid. 302 (accused has privilege to prevent disclosure of statements made during sanity board hearing, except where he opens the door by introducing such statements or places his mental state at issue through expert testimony). However, it is difficult to imagine how the petitioner would have opened the door to such evidence by putting on evidence of *the purported victim's mental state.* In any event, when the time came for the defense to present its case, evidence of the petitioner's prior inconsistent alibi, denying his presence at the scene of the shooting, was already admitted! Pros.Exh. 11.

Most damning with respect to the quality of defense counsels' representation, however, is that they made these so-called tactical decisions concerning the use of character evidence and the presentation of Dr Raisani's testimony on mere guess and speculation. Trial defense counsel never even attempted to confront these questions through the simple expediency of a *motion in limine. See,* R.C.M. 906(b)(13) ("Preliminary ruling on admissibility of evidence"); Mil.R.Evid. 104. This is clearly reflected by the following exchange:

> Q: Captain Howard, did you at any time—it seems like throughout yours and Captain Champion's testimony, you seem concerned about this one statement out there by Jeanette Miller about some sort of misconduct on the part of Staff Sergeant

> Christy toward his wife; did you ever, at any time, think, during your pretrial discussions, talk about doing a motion in limine to keep the uncharged misconduct out under any circumstances?
>
> A: Sure we did.
>
> Q: Did you present that motion to the court?
>
> A: We did not present a motion in limine on that uncharged misconduct at all.
>
> Q: Couldn't you have presented that to the court and found out under what circumstances the judge wouldn't have allowed that information in?
>
> A: That's one option we could have done.

RD. 269. Not only "could" they have submitted the motion, they "should" have done so. In any event, trial defense counsels' explanation for why they decided not to present the evidence referred to in opening statement does not hold water because information regarding uncharged misconduct was known, or at least available, to defense counsel before the start of trial. If the presentation of defense witnesses was really "chilled" by the potential admission of such evidence, trial defense counsel should never have promised that the witness testimony would be produced.

The ineffectiveness of defense counsel carried over into other aspects of the trial. As post-trial defense counsel pointed out, trial defense counsel failed to bring documentation to the court's attention showing that the petitioner was regarded a suspect by law enforcement from the very beginning of the joint military/civilian investigation. R.C.M. 1105–1106 Matters, 15 Feb 1994, para. 2e; Item 25, "Index to Preliminary Documentary Evidence," *United States v. Christy,* Allied Papers. For purposes of the motion to exclude the petitioner's statement of 12 May 1993 (R. 10–66; Pros.Exh.11) this was critical evidence. The military judge,

finding no rights advisement was required since the petitioner was not a suspect at the time of this statement, admitted this statement in which the petitioner essentially denied being present when Lori Christy was killed, contrary to his later statements. (R. 69–70). The admission of this inconsistent statement undoubtedly hampered the petitioner in presenting his accidental death theory.

Further, a key portion of the prosecution's case rested on a theory of "consciousness of guilt":

> We don't know what the intent of the accused was. We can't look inside his mind. And the government must prove to you an intent to kill Lori Christy. How do we prove intent? We look at his actions. We look at what he did. Because, in this case, actions do speak louder than words. His words tell it was a suicide; his actions tell you that he felt guilty, that he was aware that he was guilty, and everything he did pointed to his guilt. Innocent people don't tamper with evidence. If it was truly an accident, there was no need to tamper with evidence. If it truly was an accident, there was reason to call 911. If it was truly an accident, you don't leave the scene. If it was truly an accident, you don't lie to OSI repeatedly. . . .

R. 356–357. The task of the defense, of course, was to demonstrate that these actions were nothing more than a panicked response to tragic and unexpected events.

The prosecution had an important witness to establish their "consciousness of guilt" theory; Sgt Holmes. Sgt Holmes testified that he saw the petitioner's car drive by the scene five minutes before the petitioner arrived. R. 238. This, according to the prosecution, was "because he knew what had happened to his wife, and he just wanted to give himself a few extra minutes to pull himself together." R. 356.

Yet the defense could have easily established that Sgt Holmes was mistaken about seeing the petitioner's car. This is due, in part, because his view was obstructed by trees. More importantly, if the car was traveling in the direction he described, Sgt Holmes could not have seen the identifying "primer" spots on the car. R. 240, RD. 136. These points were strenuously pointed out by the petitioner to his counsel. RD. 10. Trial defense counsel, however, felt that cross-examining Sgt Holmes would make the defense "look desperate." RD. 109. Indeed, at the *DuBay* hearing, even after having heard the prosecution's closing arguments, trial defense counsel still could not recognize the importance of diminishing the impact of Sgt Holmes testimony. Capt Champion testified that he "still" didn't understand petitioner's "hang-up about it." RD. 109.

What Capt Champion failed to appreciate was the true damage to the defense from Sgt Holmes' testimony, which, came from his description of the petitioner's demeanor when returned to the house. Sgt Holmes testified:

> Q: And what happened when the accused pulled up on the—
>
> A: Sergeant Christy got out of the car; he approached me and said he needed to go inside. I told him he couldn't go in at the time and he goes, "Come on, man, it's my wife in there." I just told him—that's when the chaplain and my flight chief walked up, and I said, "*If you need to talk to anybody, ask them.*"
>
> Q: And then where did he go?
>
> A: He went over and sat down in his car and had a cigarette.

R. 238 (emphasis added).

The implication, of course, is that instead of being an individual who panicked after the accidental shooting of his wife, the petitioner was calm and rational; *i.e.*, scheming and devious. Testimony, however, could have easily been presented to rebut such an implication. Petitioner testified that he gave Capt Champion the names of the chaplain and a Major Lake (apparently the referenced "flight chief"):

> DC: Did you also give them the name of Major Lake?
>
> ACC: Yes, that was dealing with when I was waiting at the house, when I first arrived at the house. Sergeant Holmes testified that I was not emotional, just standing and leaning against the car smoking a cigarette, you know. Major Lake saw me crying and also Chaplain Duncan was there *talking with me*.

RD. 15 (emphasis added).[11] While Capt Champion denied being furnished these names, that hardly fosters confidence in the abilities of trial defense team. Sgt Holmes certainly had the information, as reflected by his trial testimony. It is difficult to imagine competent counsel not even interviewing the witnesses to whom the petitioner may have made statements on the day of the alleged crime!

CONCLUSION

The decision to forego valid defense strategies and instead pursue a "no defense" defense displayed "a serious lack of skills that are regularly found in the performance of fallible lawyers." *United States v. Mansfield*, 24 MJ 611, 616 (AFCMR 1987). The result was comparable to the "sacrifice

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[11]The prosecution offered no evidence at the *DuBay* hearing to rebut the petitioner's asserted emotional state.

of unarmed prisoners to gladiators." *Chronic*, 466 U.S. at 657, *citing United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975), *cert. denied sub nom. Sielaff v. Williams*, 423 U.S. 876 (1975). Contrary to the assertion of the Air Force Court, the petitioner does not contend that "trial defense counsel could have or should have pursued an alibi defense" (*Christy*, at 23a, Appendix B), but only that counsel were deficient in failing to adequately pursue the accident defense, as initially promised, or any defense at all.

Throughout its opinion, the Air Force Court below emphasizes the finding of the military judge that the petitioner approved or "blessed" the tactical decisions made by his trial defenders which are now at issue. (*Christy*, at 22a, 25a, Appendix B). The petitioner questions whether such a consideration has any place at all in analyzing a claim of ineffective assistance. If a lay person/client were in a position to evaluate and approve his counsel's tactical decisions, that client likely would not need the assistance of counsel. To the extent that SSgt Christy did concur in the tactical decisions at issue, he was only doing what most clients justifiably do: placing his trust in counsel, with deference to counsel's experience, judgment, and qualifications. In this case, this trust was betrayed. Notwithstanding the Air Force Court's conclusions to the contrary, trial defense counsels' explanations for their performance were insufficient to render the lack of a defense presentation "reasonable" under the total circumstances.

The United States Court of Appeals for the Armed Forces was not so generous in evaluating the trial defense counsels' performance:

> An analysis of this case under the first prong of *Strickland* reveals some unsettling circumstances.
>
> * * * * *

> While unexpected events at trial may lead to changed circumstances or different trial tactics, there is no indication of such unexpected events in appellant's case.
>
> Trial defense counsel should have realized the tactical risks and benefits of calling Dr. Raisani and character witnesses well before they presented the defense's opening statement. The character witnesses may have been particularly important to appellant's defense because evidence of appellant's good military character may be sufficient to raise reasonable doubt as to appellant's guilt, thereby bolstering appellant's accident defense.

United States v. Christy, 46 M.J. 47, 50 (1997).

Unfortunately, the Court of Appeals made an overly rigid application the second prong of the *Strickland* test and concluded petitioner was not prejudiced by the trial defense counsel's deficient performance because the other evidence presented strongly indicated his guilt. *Id.* However, the Court of Appeals disregarded the very reasonable possibility that the defense failures cost the petitioner all chances of a lesser included offense finding, if not an acquittal.

Trial defense counsel conceded away petitioner's innocence by promising crucial, exculpatory evidence and then failed to produce anything. In doing so, the defense counsel deprived petitioner of a fundamentally fair trial and greatly undermined the confidence we can have in petitioner's verdict. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 115 S.Ct. 1555, 1566 (1995).

Respectfully submitted,

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May 1997

APPENDIX A

UNITED STATES, Appellee

v.

Derrell A. CHRISTY, Staff Sergeant,
U.S. Air Force, Appellant

No. 96–0713

Crim. App. No. 31200

U.S. Court of Appeals for the Armed Forces

Argued Dec. 3, 1996

Decided March 10, 1997

Counsel

For Appellant: *Major Gerald R. Bruce* (argued); *Colonel David W. Madsen, Colonel Jay L. Cohen,* and *Captain Harold M.Vaught* (on brief); *Lieutenant Colonel Kim L. Sheffield.*

For Appellee: *Captain Libby A. Brown* (argued); *Colonel Theodore J. Fink, Colonel Jeffery T. Infelise, Colonel Thomas E. Schlegel,* and *Lieutenant Colonel Michael J. Breslin* (on brief).

Opinion of the Court

CRAWFORD, Judge:

Contrary to his plea, appellant was found guilty of the unpremeditated murder of his wife in violation of Article 118, Uniform Code of Military Justice, 10 U.S.C. § 918. The convening authority approved the sentence of a dishonorable discharge, 35 years' confinement, total forfeitures, and

reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and the sentence after a hearing on the issue of ineffectiveness of counsel was conducted pursuant to *United States v. DuBay*, 17 USCMA 147, 37 CMR 411, 1967 WL 4276 (1967).

We granted review on the following issue:

> WHETHER THE APPELLANT WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE COUNSEL, AFTER INFORMING THE MEMBERS THAT THEY WERE GOING TO PRESENT EVIDENCE OF THE APPELLANT'S PEACEFUL LAW-ABIDING NATURE AND GOOD MILITARY CHARACTER, AND ESTABLISH THE SUICIDAL TENDENCIES OF LORI CHRISTY THROUGH THE EXPERT TESTIMONY OF DR. RAISANI, NONETHELESS FAILED TO PRESENT ANY SUCH EVIDENCE ON THE BASIS THAT THERE "WAS NO DEFENSE IN THIS CASE."

We hold that appellant was not prejudiced by any of the alleged errors.

FACTS

Lori Christy was found dead from a shotgun wound on May 10, 1993. The weapon was found next to her body. What appeared to be a suicide note was found in a computer hutch in the Christy home. The day before her death, Lori Christy had threatened to commit suicide by ingesting Flexeril pills.

Investigating officials surmised that Lori Christy's death was not a suicide when they discovered that someone had ejected both the spent shotgun shell and a live shell from the

gun and then had reinserted the spent shell into the gun. The live shotgun shell was found on the floor between Lori Christy's feet.

Within the next two months, events led police to the conclusion that appellant was responsible for his wife's death. On May 12, 1993, appellant signed a sworn statement in which he stated that he had visited two friends during the time frame in which his wife died. Appellant "helped" investigators by suggesting possible suspects. On May 28, he suggested that his wife and another woman might have had a suicide pact (thus explaining the two shells). On June 2, appellant called investigators and told them that his oldest daughter believed a friend of Lori Christy's had killed her. On June 17 and 18, appellant again told investigators that he was not present when his wife died.

Then, during an interview on July 8, appellant asked investigators whether his wife's mouth and eyes were open when her body was found. Appellant had not been allowed to view the crime scene or photos of the scene. At that time, investigators became convinced that appellant knew more about his wife's death than he was telling. Appellant explained to investigators that he returned to his home and found his wife in the basement trying to pull the trigger of the shotgun with her toe. He told investigators that the gun fired when he tried to grab it away from her.

On July 10, 1993, appellant changed his story again. Appellant claimed that he returned to the house and argued with Lori Christy, that she threatened to commit suicide, and that he called her bluff by retrieving the shotgun shells and the shotgun for her. Appellant told investigators that Lori Christy then tried to pull the trigger with her toe, that he grabbed the gun away from her, and that the gun fired. According to this statement, appellant realized the spent shell had ejected from the gun. He put the shell back and placed the

gun next to his dead wife. He then left the house and attended his daughters' school program.

On July 13, appellant gave a somewhat different version of the story to investigators. In this statement, appellant informed investigators that he now remembered loading the shotgun shells into the gun. Also, he remembered that his wife had held on to the barrel of the gun and his thumb hit the trigger of the shotgun as he was pulling it away from her.

There was other damaging evidence against appellant as well. Specifically, Lori Christy told appellant on the day she died that she was having an affair and that she was leaving him. Appellant felt "good" and "happier" after his wife's death. Five unfired shotgun shells were found in appellant's trash. An expert at trial testified that if appellant had accidentally pulled the six and a half pound trigger with his thumb while pulling the gun away from Lori Christy, he would most likely have severely damaged or broken his thumb when the gun recoiled.

There was also testimony at trial that Lori Christy was not suicidal on the day of her death. She had agreed the evening before that suicide was selfish. She had made plans to go to Virginia with a friend. An alarm was set in the Christy bedroom for 6:45 p.m., the time Lori Christy was supposed to leave to attend her daughters' school program.

Appellant's actions after Lori Christy's death were perhaps the most damaging to his case. Appellant altered the scene so that it would appear that Lori Christy had committed suicide. He placed the gun by his wife's body, straightened the body, replaced the spent shell in the shotgun, and put a ladder in front of his closet so that it would appear that the 5'1" Lori Christy could reach the shotgun shells.

At appellant's trial, defense counsel stated the following during opening arguments:

Now, the evidence in this case will show that Lori Christy was a very troubled young woman. . . . You will also hear evidence of her suicidal tendencies. . . . You will also hear evidence about the mental therapy that Lori was undergoing, as well as some of the things she wrote as part of her therapy. . . .

In addition, you will see a note that was found after Lori's body was discovered. And Colonel Raisani, an Air Force forensic psychiatrist, will testify that this note was, in fact, a suicide note. . . .

* * *

Finally, you will hear evidence and see evidence of Sergeant Christy's good military character and that he has never been in trouble before.

Despite these assertions, trial defense counsel did not call any witnesses. In its case in chief, the prosecution introduced the alleged suicide note into evidence and also elicited testimony regarding Lori Christy's suicidal state the day before her death. Trial defense counsel introduced appellant's military record into evidence during the sentencing phase of the trial but did not call any character witnesses.

DISCUSSION

The Sixth Amendment guarantees a criminal defendant "Assistance of Counsel for his defence." This Court has unanimously adopted the test for ineffective assistance of counsel established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See United States v. Ingham*, 42 MJ 218, 223 (1995).

Strickland creates a two-prong test to determine whether an accused was denied effective assistance of counsel. The first prong is whether counsel's conduct "fell below an objective standard of reasonableness." *Strickland v.*

Washington, supra at 688, 104 S.Ct. at 2064. We "strongly presume[]" that counsel has provided "adequate assistance." *Id.* at 690, 104 S.Ct. at 2066.

The second prong is whether there was prejudice. *Id.* at 692, 104 S.Ct. at 2067. An appellant who alleges prejudice must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result in reliable." *Id.* at 687, 104 S.Ct. at 2064. As the Supreme Court noted in *Lockhart v. Fretwell,* 506 U.S. 364, 369–70, 113 S.Ct. 838, 842–43, 122 L.Ed.2d 180 (1993)(footnote omitted):

> [A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

An analysis of this case under the first prong of *Strickland* reveals some unsettling circumstances. As we stated in *United States v. Fluellen,* 40 MJ 96, 98 (CMA 1994), "It is important for counsel to evaluate all of the evidence and determine the strategy that is most likely to be successful." Prior to trial, counsel should decide, as a tactical matter, "which witnesses not to call because of their potential for impeachment and corroboration of the prosecution's case." *Id.* Opening statements are a "critical part of the trial. . . . It is during the opening statement that the parties set forth their theory and theme of the case." *United States v. Turner,* 39 MJ 259, 265 (CMA 1994). While unexpected events at trial may lead to changed circumstances or different trial tactics, there is no indication of such unexpected events in appellant's case.

Trial defense counsel should have realized the tactical risks and benefits of calling Dr. Raisani and character

witnesses well before they presented the defense's opening statement. The character witnesses may have been particularly important to appellant's defense because evidence of appellant's good military character may be sufficient to raise a reasonable doubt as to appellant's guilt, thereby bolstering appellant's accident defense. *See United States v. Breeding*, 44 MJ 345 (1996), and cases cited therein. However, we do not need to decide whether defense counsel's conduct fell below an objective standard of reasonableness because it is clear that appellant was not prejudiced by the conduct of his trial defense counsel.

Appellant made numerous incriminating and contradictory statements to the police. He informed his defense counsel that he was not at the house when his wife died, despite the three detailed statements to the police in which he admitted that he was present. Defense counsel had their hands tied. Had they put appellant on the stand, the members would have been even more skeptical of appellant's ever-changing stories. Appellant's statements significantly strengthened the case against him because they indicated guilt. "We have little patience, generally, with appellate calls for a penalty flag from an accused who, when all is said and done, was mugged—if at all—largely by his own lack of candor with his counsel." *United States v. Meadows*, 42 MJ 132, 138 (1995).

The Government's case against appellant was very strong. Appellant lied to investigators. Appellant tried to make Lori Christy's death look like a suicide. Appellant misled investigators by suggesting that another person had killed his wife. There was evidence of appellant's anger at Lori Christy. Appellant did not appear upset when he arrived at his daughters' school program after his wife's death, and he felt "good" and "happier" after his wife died. Further, appellant admitted that he retrieved the gun and shells, and admitted

that he loaded the gun. An expert testified that if things had occurred as appellant claimed, appellant would most likely have severely damaged or broken his thumb when the gun recoiled. In sum, appellant's actions before and after Lori Christy's death provide ample evidence that the results of the trial were reliable.

Appellant's trial was not fundamentally unfair. *See Strickland v. Washington, supra* at 668, 104 S.Ct. at 2052; *United States v. MacCulloch*, 40 MJ 237 (CMA 1994).

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Chief Judge COX and Judges GIERKE and EFFRON concur.

SULLIVAN, Judge (concurring in the result):

The majority appears to resolve this claim of ineffective assistance of counsel on the basis of the strength of the Government's case. ___MJ (*10*). However, I agree with the appellate court below and its initial approach to this claim, which focus on the reasonableness of defense counsel's conduct in the context of the entire trial. It said:

This leaves two issues in need of further comment. First, in their opening statement counsel did, indeed, promise to put on Col (Dr.) Raisani, who had reviewed the results of the sanity board, and who would have testified as to his conclusion that Lori was genuinely suicidal at the time of her death. Defense counsel explained at the *DuBay* hearing that it was their belief that, as the government's case-in-chief unfolded, there was more than ample evidence of this, including the testimony as to the Flexeril pills and the suicide note. They were concerned that cross-examination of Dr. Raisani might well have produced adverse testimony, including the disclosure that appellant had told the sanity board that he was *not* in the house, and that, at least part of

what may have contributed to Lori's suicidal ideation was appellant's having recently attempted to force her to participate in anal sex. In addition, under the accident theory of the case, it was essentially conceded that Lori had not, in fact, committed suicide. While not as inevitable as, say, the decision to go with the accident defense, not appearing to unnecessarily denigrate a murder victim is entirely defensible. The military judge, after conducting an exhaustive post-trial hearing, found that this decision was fully discussed with appellant, and he agreed to it. Under the circumstances, therefore, it was well within the deference we afford defense counsel in the conduct of a trial. *See United States v. Brothers*, 30 MJ 289, 291 (CMA 1990).

The decision not to put on any favorable character testimony following the government's case in chief was also not unreasonable. Counsel knew that "did you know, have you heard" questions, including the allegation of forced anal sex, appellant's expression of satisfaction to the AFOSI after his wife's death, his feeling of "arrogance" when he saw Jeanette at the auditorium in the immediate aftermath of the killing, evidence of recent bruising on Lori's body, and other similar indicia, could nullify any help offered by character evidence, and might well prove disastrous. This, too, according to the findings of the judge, was comprehensively discussed with the appellant before the decision was made to rest, and met with his approval.

Unpub. op. at 9, 1996 WL 75832.

I affirm the decision of the lower court.

APPENDIX B

UNITED STATES

v.

Staff Sergeant DERRELL A. CHRISTY,
FR481–92–9881, United States Air Force
United States Air Force Court of Criminal Appeals

ACM 31200

14 February 1996

Sentence adjudged 3 December 1993 by GCM convened at Whiteman Air Force Base, Missouri, Military Judge: Michael B. McShane.

Approved sentence: Dishonorable discharge, confinement for 35 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Jay L. Cohen and Captain Robert E. Watson.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise and Colonel Thomas E. Schlegel.

Before

PEARSON, SCHREIER, and MORGAN
Appellate Military Judges

OPINION OF THE COURT

MORGAN, Judge

Convicted of the unpremeditated murder of his wife and sentenced to a dishonorable discharge, confinement for 35 years, total forfeitures and reduction to E-1, appellant

complains of the ineffective assistance of counsel and that the evidence was factually insufficient to sustain his conviction. Disagreeing as to both allegations of error, we affirm.

FACTS

On May 9, 1993, the appellant walked into his quarters at Whiteman Air Force Base (AFB) to find his wife, Lori, locked in a sapphic embrace with their neighbor, Mrs. Jeanette Miller, wife of SrA George Miller. It came out during trial that Jeanette and Lori had only recently become physically involved, which included at least one *ménage á trois* with SrA Miller, Jeanette and Lori.

At first appellant affected not to notice anything amiss, but shortly after midnight, May 10, 1993, Lori called Jeanette, despondent. Confronted by the appellant, she had confessed to a physical attraction to Jeanette, but claimed it was a one-time event. Appellant had left the quarters, angry, and Lori spoke of suicide. Jeanette put her husband on the phone to continue to speak with Lori while she rushed over to the Christy quarters, about a block away. She found Lori with 27 Flexeril tablets (a muscle relaxant). She testified that she reminded Lori of her responsibility to the two Christy daughters, of her religious scruples, and of her earlier declaration that suicide, however convenient, was ultimately the most selfish of all acts. Jeanette testified that this soothed Lori, and that when she finally left, Lori seemed cheered and had put aside any thought of destroying herself.

Later that day, Lori returned to the Millers, explaining that she and appellant had undergone a cathartic discussion, and that appellant has sent her over there to declare that it was over between her and the Millers. But Jeanette would have none of this. She instead convinced (the apparently malleable) Lori to return to her quarters, confront her husband, and seek

a divorce. To ensure Lori would follow through, Jeanette accompanied her back to the Christy household. There, according to Jeanette, Lori did as she had been told, and reminded appellant, in addition, that she and Jeanette would be going off together for a weekend. Furious, appellant departed the quarters at approximately 1755 hours, leaving Lori and Jeanette alone. (The Christy girls were at the Millers.) Jeanette left the quarters to return to her own at 1815 hours.

There was a school program at Whiteman Elementary School that evening at 1900 hours, and the daughters of both families were to perform. Before leaving, appellant said that he would meet everybody at the school at 1900 hours. Jeanette and SrA Miller were to pick Lori up to take her to the school at 1845 hours.

At about 1845 hours the Millers drove to the Christy quarters. Lori was not waiting, and appellant's Firebird was not in the driveway. Finding the door unlocked, Jeanette went into the house, calling for Lori. Proceeding to the master bedroom, she noted a dripping, wet shower stall, a wet towel on the unmade bed. An alarm clock, pulled the full extent of its cord, was laying beside the bed, beeping and flashing "1845." She did a hasty tour of the house, calling Lori's name, but received no response. Assuming that appellant had already picked her up and taken her to the school, the Millers departed.

At the school, which apparently was only blocks away, the Millers did not see either of the Christys. SrA Miller departed at his wife's urging, searching for the appellant's car. He drove by the Christy quarters and knocked on the door, but received no answer. It was now about 1850 hours. Returning to the auditorium, he noted that appellant was now seated a few chairs away from his wife, without Lori. Again, at his

wife's urging, he returned to the Christy household. This time, he went in. As his wife had done a few minutes earlier, he noted the still-wet shower off the master bedroom. A step-stool was positioned in front of the closet in the master bedroom. Proceeding downstairs to the basement, he walked around to a position in front of a high-backed plaid-upholstered couch. There he discovered the body of Lori Christy, slouched on the left hand side of the couch, her head below the high back so that she could not be seen from the stairwell (from which Jeanette had earlier quickly surveyed the basement). A 12 gauge shotgun was leaning against her, butt on the floor, barrel across her knee. An unexpended shotgun shell was lying on the floor at her feet.

Panicked, SrA Miller couldn't remember the number for the police, so he ran upstairs and drove to the security police station to report his discovery. Minutes later, Jeanette Miller, hearing sirens and seeing flashing lights from a vantage point at the school gym, suspected the worst and called the Christy household. When a security policeman answered the phone, she hung up and returned to appellant, who had never asked the whereabouts of his wife since coming to the school auditorium. She advised him that there was trouble and he needed to go right home. Appellant departed, according to Jeanette, looking angry, but strangely calm.

Sergeant (Sgt) Holmes was one of the first security policemen on the scene. Upon the arrival of medical personnel, Sgt Holmes, unthinking, moved the shotgun from Lori Christy to get it out of the way of emergency personnel. At some point he attempted to rack the pump on the shotgun to clear it, but was unable to do so. This was because, as it turned out, the shotgun had *already* been racked after the fatal shot had been fired. Somebody had pumped the gun after the shot, ejecting the spent shell, and had then racked it again,

ejecting the unspent cartridge found at Lori's feet. The spent cartridge had then been replaced in the chamber.[1]

Sgt Holmes also testified that he saw the appellant drive by the house, slowly, but then proceed on. A few minutes later, the car returned from the opposite direction, and appellant emerged. He testified that appellant seemed unnaturally calm about the whole thing and did not protest much when he was restrained from visiting the scene of his wife's death. Instead, appellant returned to his car and had a cigarette. The police discovered a "suicide" note, subsequently found to be in Lori's handwriting, in which she professed her undying love for her children, and remorse for how she had hurt her husband.

An autopsy revealed that Lori had been killed instantly by a single shotgun blast which exploded her heart and her left lung. Scorching on her chest and powder on her left hand indicated that the gun had been up against her chest, and that she had her left hand at or near the muzzle when the gun discharged.

Appellant appeared to have an airtight alibi. He gave the AFOSI a statement in which he indicated the he had gone first

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[1]Forensic testing subsequently revealed that the spent cartridge had two sets of extractor marks on it. Once for when it had been initially ejected after the fatal shot, once more when Sgt Holmes ejected it after pushing the release. The unspent cartridge had one set of extractor marks, indicating that it had been loaded, but that somebody had ejected it. The significance of this—that it virtually precluded the possibility of suicide, was apparently lost. Special Agent (SA) Messick of the Air Force Office of Special Investigations (AFOSI), who assumed principal responsibility for the investigation of the case, was not told of this anomaly until the next day, May 11. While he appreciated its significance, he testified that he suspected that Sgt Holmes may have ejected both cartridges, then, realizing his blunder, had attempted to restore the crime scene by putting the spent cartridge back in the chamber. Later, Sgt Holmes was polygraphed on his account of what happened and no deception was indicated.

to visit a friend and "business partner" at Harbor Motors, Mr. Ray Ferraer, and then visited another friend, Sgt Bernard. Between the two of them, his time was fully accounted for between 1755 and 1900 hours, when he had appeared at the school auditorium.[2]

Investigators had nowhere to go. Although the position of the shotgun and the re-chambered spent round were inconsistent with a suicide, there was nothing to tie either of the Millers or appellant to the crime. In addition, those two inconsistencies were attributable, potentially, to the luckless Sgt Holmes, who, it was thought, may have disturbed the scene more than he was willing to admit.

Both of the Millers and the appellant consented to be polygraphed. SA Dorothy Cain administered the polygraphs to appellant on June 17-18, 1993, and preceded each with the appropriate rights advisement. Both of the Millers "passed," but appellant, asked if he shot Lori, was "deceptive" when he answered "no." Retested the following day, a similar result obtained. He explained to SA Cain that, as he left the house on May 10, Lori had touched him on the shoulder and told him she loved him. He had coldly rebuffed her. When he thinks of her being shot, he blames himself for precipitating her suicide.

SA Cain testified that this explanation was at least plausible, and she endeavored to construct questions which would skirt the emotionally freighted shooting. Appellant consented to do another interview on July 8. This time she asked if appellant had been in the house between 1800 and 1900 hours on May 10. He was descriptive in responding to this, as well. In the post-polygraph interview, appellant asked

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[2]Mr. Ferraer's account of the times that appellant was with him proved later to be quite adaptable, and more or less specific as the occasion demanded. But in the immediate aftermath of the crime, he was taken at his word.

if Lori had been found with her eyes half open, her mouth slightly agape. For the first time, SA Cain became convinced that appellant was in some fashion culpable, knowing that he had not been admitted to the crime scene, and had no way of knowing how Lori had looked in death.

By the conclusion of the 8 July interview appellant was tired, but agreed to reduce his statement to writing when he returned on 10 July. Again advised of his rights; and waiving same, appellant executed a hand-written sworn statement in which he admitted that he returned to the quarters, and found Lori preparing to kill herself with the shotgun. He claimed that either she or he loaded the shotgun with two shells, he didn't remember which. She then seated herself on the couch and began to put her toe in the trigger, holding the shotgun up against her chest with her left hand, the butt resting on the floor. Realizing she was serious, the appellant shouted "no!" and made a grab for the rifle, but somehow it went off. Panicked, he racked the gun, ejecting the spent cartridge, which he subsequently replaced. He did not remember why he racked the shotgun following the accident, or why or how the unspent cartridge was ejected.

Appellant's handwritten draft was transcribed into a typewritten statement, which appellant edited, corrected, swore to, and signed. On July 13, tested on the substance of the 10 July version, he again was "deceptive" on critical questions. He executed a second, signed sworn statement, in which he now remembered that he returned home and Lori showed him the suicide note. Thinking she is "bluffing" he loads the shotgun, removing the shells from the top shelf of the closet in the master bedroom.[3] He hands Lori the shotgun,

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[3]There was evidence that Lori was quite short, only 5′1″ or 5′2″, and would have been unable to reach the top shelf of the closet. The prosecution theorized that placement of the stepstool at the location, given appellant's declaration that *he* got the shells down, was a contrivance intended to reinforce the suicide theory.

and she leans into it, holding it against her chest with her left hand. But, according to this version, she withdraws, "chickens out." Appellant, angered, strides over to her saying, "you're lying about this [the suicide] just like you're lying about everything else." He grabs the shotgun with his right hand, fingers curled over the top. Somehow, his thumb slides inside the trigger guard. In the course of picking up the gun, with Lori continuing to hold it against her chest, his thumb pulls the trigger and the gun goes off. Shocked and horrified, appellant replaces the spent cartridge into the receiver, straightens her body on the couch, leans the gun against the body of his wife, and departs for the school auditorium

As before, after making the oral statement, appellant wrote a longhand version, which was subsequently reduced to a typed statement, edited, and sworn. At this point, appellant was placed into pretrial confinement, accused of the murder of his wife.

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant first met with counsel, Captain (Capt) C, the Area Defense Counsel, and Capt H, the Circuit Defense Counsel, after he had already delivered two rights-advised, sworn, written statements to the AFOSI. However, to his counsel, appellant insisted that, in fact, he had not been back to the quarters at all, and that the AFOSI had somehow tricked him into confessing (twice) to something he didn't do. Counsel asked for and received a sanity board, but the board concluded that he suffered from no mental disease or defect which impaired his ability to appreciate the nature or criminality of his act. During the sanity board, appellant insisted that he had not been in the quarters at the time, and claimed a memory loss during the relevant 30 minutes or so (although his memory was perfectly intact for all events up

until that time and all after.) The board concluded he was "malingering" on his claimed loss of memory.

Nevertheless, appellant's counsel were faced with a Hobson's choice: either they went with a defense of "accident" and attempted to incorporate and reconcile appellant's statements; or they returned to the alibi defense, with the obvious consequence that they would have to somehow suppress or explain-away appellant's two sworn statements.

If they were able to suppress the two statements, the alibi defense became very appealing, because in the absence of appellant's admissions, there was almost nothing with which to pin the crime on him. At a lengthy pretrial session, defense counsel moved to suppress the two statements, arguing that an 8 July "view questionnaire" given to appellant without advisement of rights, tainted the succeeding two statements. The military judge suppressed the view questionnaire itself (which contained nothing incriminating) holding that the failure to advise appellant of his rights *after* his ambiguous performance in mid-June violated his rights under Article 31, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 831. But he declined to suppress the 10 and 13 July statements, noting that the view questionnaire had no logical connection to appellant's subsequent admissions, and that he was fully advised of his rights before each.

It was under this circumstance that appellant's counsel faced trial. After conferring with and securing the approval of their client, they elected to go with the "accident" defense, necessitating keeping appellant off the stand, as he insisted that he would testify to the effect that he hadn't been in the quarters at all during the relevant time period. It is in the context of this factual and legal situation that appellant now asks this Court to hold that his two counsel failed to render him effective assistance.

At the conclusion of the case, appellant complained to the convening authority that he was inadequately represented. The convening authority ordered a hearing under *United States v. DuBay*, 17 U.S.C.A. 147, 37 C.M.R. 411 (1967) and Rule for Courts-Martial (R.C.M.) 1102. Distilled to their essentials, appellant complained his defense counsel:

1. Failed to seek to suppress the 10 and 13 July statements on the basis of voluntariness;

2. Ignored the possible defense of alibi;

3. Disregarded appellant's observation that the president of the court appeared to be nodding off;

4. Failed to present evidence as to Lori's suicidal disposition and his own good character during findings, despite indicating an intention to do so in opening statement;

5. Failed to contact a proposed witness to good character;

6. Conducted an inadequate cross-examination of Sgt Holmes, SA Messick and a government expert;

7. Failed to investigate a sermon heard by Lori the day before her death condemning homosexuality.

We hasten to add at this point that we have no intention of "getting into the weeds" and joining appellant in peering over the shoulder at the performance of defense counsel with the preternatural focus of hindsight. The law does not require it; time and judicial economy forbid it. Some of the asserted errors were found by the military judge conducting the *DuBay* hearing to be factually unsupported—specifically, he found that although appellant believed that he saw the president beginning to nod off, there was insufficient evidence to substantiate that he had fallen asleep. Every member of the court save one (who was TDY) was questioned under oath,

and none had seen the president fall asleep. The bailiff, members of the gallery, and others were questioned. Only appellant, his sister, his niece, and the ever-helpful Ray Ferraer claimed to have seen the sleeping, and their testimony contradicted each other as to time, place, and duration. Under the circumstances we do not find that the military judge was clearly erroneous in finding that "Col [C] was not asleep or inattentive during any portion of the trial."

The military judge further found that every significant decision on trial strategy, including the key decisions not to pursue the alibi defense and (consequently) not to put appellant on the stand, was accompanied by thoroughgoing discussions between counsel and appellant, and received appellant's blessing.

Standards for Evaluating an Ineffective Assistance Claim

In *Strickland v. Washington,* 466 U.S. 668 (1984), the Supreme Court annunciated the standards by which claims of ineffective assistance of counsel are to be measured. Simplified, they are that counsel's performance must be so deficient, so unreasonable, and the errors so serious, as to conclude that counsel was not functioning as the "counsel" contemplated by the Sixth Amendment. Second, counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* at 687.

The Court was mindful that such a standard constituted a significant barrier to an appellant wishing to assert ineffective assistance as an error, and candidly admitted that to be intentionally so, writing:

> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved

> unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense.

Id. at 690.[4]

The Court of Appeals of the Armed Forces has assiduously applied the guidance of the Supreme Court on this issue, most recently in *United States v. Ingham,* 42 M.J. 218 (1995). There, as here, appellant had complained of a failure to cross-examine certain witnesses as appellant would have liked, failure to call other witnesses, and failure to object to the admissibility of certain evidence. The *Ingham* court, although not furnished the benefit of a *DuBay* hearing on the issue, nor ever an affidavit from the defense counsel, began its analysis by asking whether the trial defense counsel had a reasonable trial strategy—not whether it was the best strategy, nor even a good one, but whether it was *reasonable.*

Appellant Received Effective Assistance of Counsel

We have no difficulty in deciding that, confronted with two virtual confessions by the appellant, an accident theory, however it might have offended the laws of physics, common sense, and human nature, was not merely a *reasonable* strategy, but indeed, it was virtually the only strategy availing. In this respect, we dismiss categorically appellant's near-ludicrous postulate that trial defense counsel could have or should have pursued an alibi defense in the face of appellant's two sworn statements in which he admitted to being, at the very least, an inadvertent instrumentality in his wife's shooting.

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[4]The Court was hardly straining at gnats. The danger of double litigation is exemplified by this case, where the trial itself consumed approximately 400 pages of transcript, not including exhibits, and the *DuBay* hearing, which essentially tried appellant's lawyers, took another 300 pages.

Defense counsel reasoned, and experience has indeed shown, that court members are extremely skeptical of recanted confessions, and that they may well consider an attempt to do so as an affront to their intelligence and common sense. *See, e.g., United States v. Burks,* 36 M.J. 447 (C.M.A. 1993), *cert. denied,* —U.S.—, 114 S.Ct. 187 (1993). Not pursuing evidence, or cross-examining witnesses, where the evidence or the cross-examination would contribute nothing to the accident theory, was not only reasonable, it was sound trial strategy. Counsel wisely reflected on the known consequences of alienating court members through the peddling of absurd or inconsistent theories, and were scrupulous not do so.

In addition, the defense of accident, if even partially believed, afforded the appellant the possibility of conviction of a lesser included offense, including voluntary manslaughter, involuntary manslaughter, or negligent homicide. Alibi was an all-or-nothing proposition.

This leaves two issues in need of further comment. First, in their opening statement counsel did, indeed, promise to put on Col (Dr.) Raisani, who had reviewed the results of the sanity board, and who would have testified as to his conclusion that Lori was genuinely suicidal at the time of her heath. Defense counsel explained at the *DuBay* hearing that it was their belief that, as the government's case-in-chief unfolded, there was more than ample evidence of this, including the testimony as to the Flexeril pills and the suicide note. They were concerned that cross-examination of Dr. Raisani might well have produced adverse testimony, including the disclosure that appellant had told the sanity board that he was *not* in the house, and that, at least part of what may have contributed to Lori's suicidal ideation was appellant's having recently attempted to force her to participate in anal sex. In addition, under the accident theory

of the case, it was essentially conceded that Lori had not, in fact, committed suicide. While not as inevitable as, say, the decision to go with the accident defense, not appearing to unnecessarily denigrate a murder victim is entirely defensible. The military judge, after conducting an exhaustive post-trial hearing, found that this decision was fully discussed with appellant, and he agreed to it. Under the circumstances, therefore, it was well within the deference we afford defense counsel in the conduct of a trial. *See United States v. Brothers*, 30 M.J. 289, 291 (C.M.A. 1990).

The decision not to put on any favorable character testimony following the government's case in chief was also not unreasonable. Counsel knew that "did you know, have you heard" questions, including the allegation of forced anal sex, appellant's expression of satisfaction to the AFOSI after his wife's death, his feeling of "arrogance" when he saw Jeanette at the auditorium in the immediate aftermath of the killing, evidence of recent bruising on Lori's body, and other similar indicia, could nullify any help offered by character evidence, and might well prove disastrous. This, too, according to the findings of the judge, was comprehensively discussed with the appellant before the decision was made to rest, and met with his approval.

Finally, we agree with the military judge that defense counsel took their best shot at suppressing the two statements when they attempted to link them with the view questionnaire. The trial defense counsel concluded that a motion to suppress those statements on the grounds that they were involuntary, in the face of repeated reading and waiver of rights, frequent breaks for food, rest, and cigarettes, and the appellant's own admissions that he was never put into physical discomfort, or his liberty restricted, was doomed. The military judge agreed, and so do we. Under the circumstances, it was hardly unreasonable for defense counsel to decide that making such a

motion might destroy their credibility with the military judge and jeopardize other, more meritorious efforts.

In *Strickland,* the Court stated that an appellant was required to meet both criteria to succeed in an ineffective assistance gambit. Failure to meet one or the other of the *Strickland* tests was dispositive of the issue. The Court, sensitive to judicial economy and the high threshold imposed by the second of the two prongs, encouraged appellate courts to decide cases on that prong alone—that is, for a claim of ineffective assistance to succeed, there must be a "reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different." *Strickland,* 466 U.S. at 692. The Court continued:

> If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Id. at 697. In this case, appellant set his counsel a near Sisyphean task—to gain an acquittal in the face of two near-confessions, or to sell an implausible theory of accident without any assistance from his own testimony. Neither the Sixth Amendment nor Article 27 of the UCMJ requires counsel to do the impossible. "If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." *United States v. Cronic,* 466 U.S. 648, 659 (1984). We can conceive of no possibility, no unexplored avenue, no trial strategy, and no tactical gambit, which could reasonably have changed the result here, or which diminishes even slightly our confidence in it. Much less do we perceive any error by defense counsel which raises even a remote possibility of a different result.

FACTUAL SUFFICIENCY

With the preceding as backdrop, we need not tarry on the obvious conclusion that we are ourselves satisfied beyond a reasonable doubt of the appellant's guilt of unpremeditated murder. *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987). Expert testimony indicated that the shotgun was held against Lori's chest at an angle of approximately 22 degrees from the horizontal—an angle consistent with the image of Lori sitting on the couch, and appellant standing over her, the muzzle pressed against her heart, the butt against his shoulder, her hand on the barrel in an ultimately ineffectual attempt to push it away. The shotgun had a normal trigger pull of around 6 pounds. Appellant's own expert could not replicate the situation postulated by appellant's 13 July statement. The government's expert testified that, if the shotgun had been somehow triggered by appellant's thumb in the position he described, the ensuring recoil would likely have broken his thumb, or at the very least caused him severe and obvious injury.

Along the same vein, appellant's post-mortem actions were entirely inconsistent with even a personal belief that what had happened was an accident. No effort was made to secure emergency medical assistance to possibly save Lori's life. Particularly damning was the ejection of the spent shell *and* the second shell, the reinsertion of the spent shell, the too-neat placement of the shotgun, and the subsequent planting of a step-stool at the master bedroom closet to make it appear that Lori had retrieved the shotgun shells. No fingerprints, not even Lori's, were found anywhere on the shotgun. Appellant's obvious lack of curiousity as to the whereabouts of his wife when he arrived at the school, notwithstanding his earlier agreement that the Millers were to bring her with them, and his drive-by past his quarters are

consistent with one who knew himself to be a murderer, not the unwitting witness to a terrible accident.

CONCLUSION

The findings and sentence are correct in law and fact, the sentence is appropriate, and the same are hereby

AFFIRMED.

Senior Judges PEARSON and SCHREIER concur.

OFFICIAL

LAURA L. GREEN
Clerk of Court
Court of Criminal Appeals